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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

IN RE: TFT-LCD (FLAT PANEL)
ANTITRUST LITIGATION

Case No. 3:07-md-1827 SI (N.D. Cal.)
MDL NO. 1827

This Document Relates to:

*Best Buy Co., Inc., et al. v. AU Optronics
Corp., et al*, Case No. 10-CV-4572,

*Best Buy Co., Inc., et al. v. Toshiba Corp.,
et al.*, Case No. 12-CV-4114,

*Target Corp., et. al., v. AU Optronics
Corp., et al.*, Case No. 10-CV-4945

**DEFENDANTS' MOTION FOR AN ORDER
ADOPTING A PROCEDURE TO
RESOLVE OUTSTANDING QUESTIONS
OF FACT WITH RESPECT TO
PLAINTIFFS' STANDING UNDER
SECTION 4 OF THE CLAYTON ACT**

ORAL ARGUMENT REQUESTED

Date: June 14, 2013

Time: 9:00 a.m.

Place: Courtroom 10, 19th Floor

Judge: Hon. Susan Illston

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on June 14, 2013, at 9:00 a.m., or as soon thereafter as the
3 matter may be heard, in Courtroom 10, 19th Floor, 450 Golden Gate Avenue, San Francisco,
4 California, before the Honorable Susan Illston, the undersigned Defendants will and hereby do
5 move the Court, pursuant to Rule 7(b) of the Federal Rules of Civil Procedure, to enter an Order
6 adopting a procedure for resolving outstanding questions of fact with respect to the Track 1B
7 Plaintiffs' standing to recover damages under Section 4 the Clayton Act.

8 The motion is based on this Notice of Motion and Motion, the Memorandum of Points and
9 Authorities in Support Thereof, any papers filed in reply, the argument of counsel, and all papers
10 and records filed in this matter and such other matters as the Court may consider.

RELEVANT PRIOR ORDERS

Pursuant to this Court's April 9, 2012 Order (MDL Dkt. No. 5429), requiring the parties to "list the prior orders of this Court that address substantially similar arguments as those raised in the brief," Defendants provide the following chart of relevant orders.

Date	MDL Dkt. No.	Indiv. Dkt. No.	Case. No.	Plaintiff	Order and Issue(s) Addressed
3/3/2009	873	NA	07-md-1827	DPPs	Order Denying Tatung Company of America's Motion to Dismiss DPPs' First Amended Complaint (denying motion to dismiss due to disputed issues concerning ownership and control)
3/28/2010	1643	NA	07-md-1827	DPPs	Order Denying Tatung Company of America's Motion for Leave to File a Motion for Reconsideration of March 3, 2009 Order Denying Motion to Dismiss (denying motion for reconsideration, due to disputed issues concerning ownership and control)
7/19/2010	1885	64; 43	09-cv-4997; 09-cv-5840	AT&T; Motorola	Order Denying Tatung Company of America's Motions to Dismiss (denying motion to dismiss due to disputed issues concerning ownership and control)
11/7/2011	4108	NA	07-md-1827	DPPs	Order Denying Toshiba Entities' Motion for Partial Summary Judgment under <i>Illinois Brick</i> (denying motion for summary judgment on the ground that <i>Royal Printing</i> requires a showing of ownership and control between the direct purchaser and a conspirator)
6/28/2012	NA	NA	07-md-1827	DPPs	DPP Trial Transcript at 3566:15-20; 3576:10-11 (denying Toshiba's request for verdict form requiring a finding of ownership or control)

1	8/21/2012	6505	68	11-cv-06241	CompuCom	Order Granting in Part Defendants' Joint Motion to Dismiss and NEC's Motion to Dismiss (CompuCom) (finding that evidence against NEC was "not particularly probative of NEC's participation in the conspiracy")
2	11/19/2012	7188	417; 305; 419; 314; 396; 297	09-cv-4997; 10-cv-4572; 10-cv-1064; 10-cv-0117; 10-cv-4945; 11-cv-0058	AT&T; Best Buy; Dell; Electrograph; Target; Costco	Order Denying Defendants' Joint Motion and Toshiba's Separate Motion for Partial Summary Judgment for Lack of Standing under <i>Illinois Brick</i> and <i>ATM Fee</i> (denying summary judgment due to questions of material fact concerning standing under <i>ATM Fee</i>)
3	11/28/2012	7255	58	12-cv-0335	ViewSonic	Order Granting in Part Defendants' Joint Motion to Dismiss (ViewSonic) (finding that ViewSonic had alleged sufficient facts to support standing at the motion to dismiss stage)
4	12/26/2012	7422	299	11-cv-0058	Costco	Order Granting in Part Defendants' Motion for Summary Judgment as to Costco's Indirect Purchases (granting motion for summary judgment where Costco failed to demonstrate that direct purchasers were owned or controlled by an alleged conspirator; denying summary judgment with respect to purchases from Panasonic and JVC due to questions of material fact concerning ownership and control)
5	1/23/2013	7543	52	12-cv-4114	Best Buy	Order Denying Toshiba's Motion to Dismiss Best Buy's First Amended Complaint (finding that Best Buy had alleged sufficient facts to support standing at the motion to dismiss stage)

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3/20/2013	7661	35	12-cv-3802	Proview	Order Granting in Part Defendants' Motion to Dismiss Proview's Second Amended Complaint (dismissing claims based on purchases from certain entities, due to Proview's failure to allege facts supporting ownership or control)
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I. INTRODUCTION

At the March 15, 2013 Joint Case Management Conference, the Court informed the parties that it would not be holding a pretrial evidentiary hearing concerning Plaintiffs' standing under *In re ATM Fee*. Civil Pretrial Minutes, Dkt. No. 7655 (Mar. 19, 2013) ("As to Track I(b), there will be no ATM FEE evidentiary hearing."). When the undersigned observed that the Court's prior orders on *ATM Fee* left unresolved certain questions of material fact concerning ownership and control, the Court suggested that the undersigned propose a procedure for the resolution of those outstanding factual questions. Tr. of Proceedings held on March 15, 2013 at 16, Dkt. No. 7675 (Mar. 26, 2013) ("Well, perhaps you could suggest how the Court ought to handle it if it's not going to have a separate evidentiary hearing."). Defendants hereby submit the following proposal for the resolution of those factual issues, which will determine Plaintiffs' standing to recover certain damages under the Clayton Act.

II. ARGUMENT

A. **This Court Has Previously Held that Questions of Fact Concerning Plaintiffs' Standing Remain Unresolved**

No Plaintiff in this MDL has filed a dispositive motion to confirm its alleged standing under *ATM Fee*. Plaintiffs have, at most, raised issues of material fact that were sufficient to resist Defendants' motions for summary judgment, but which still require resolution at trial.

The Court's order denying the Track 1 Defendants' motion for summary judgment confirms that certain factual questions underlying Plaintiffs' assertion of standing remain unresolved. In the briefing for that motion, Defendants disputed Plaintiffs' evidence of ownership or control with respect to various categories of direct purchasers, including: direct purchasers allegedly owned or controlled by conspiring sellers; direct purchasers with attenuated relationships with conspiring sellers; direct purchasers only minimally owned by a conspiring seller; and direct purchasers that plaintiffs simply did not discuss. Order Denying Defendants' Joint Motion and Toshiba's Separate Motion for Partial Summary Judgment for Lack of Standing at 8, Dkt. No. 7188 (Nov. 19, 2012) (describing defendants' arguments). The Court denied Defendants' motion on the ground that "sufficient evidence exists *to create a genuine issue of*

1 *material fact* regarding the ability of plaintiffs to show that the product they purchased was
 2 manufactured by *any* of the co-conspirators.” Order at 8 (first emphasis added). In the same
 3 opinion, the Court also found that “a genuine issue of material fact exists” with respect to
 4 Plaintiffs’ standing to pursue damages based on “products purchased by or sold to a systems
 5 integrator, ODM or other third party before reaching the Direct Action purchasers.” Order at 6
 6 n.6.

7 These factual questions are not merely theoretical. The Track 1B Plaintiffs have claimed
 8 millions of dollars in damages based on purchases from entities for which questions of ownership
 9 and control are far from settled. For instance, Best Buy and the Target Plaintiffs claim that, under
 10 their “alternative” damages scenario, they have standing to recover \$14.26 million collectively for
 11 alleged overcharges based on purchases from Panasonic. *See* Chung Decl. Ex. A (Best Buy
 12 revised damages tables, identifying suppliers (though not specific entities) from whom Best Buy
 13 made purchases that are allegedly actionable under the Clayton Act); Ex. B (same with respect to
 14 Target Plaintiffs). Similarly, in the Costco action, this Court has recognized that genuine
 15 questions of material fact remain unresolved with respect to the ownership and control
 16 relationships necessary to establish Plaintiffs’ alleged standing to recover damages for purchases
 17 from Panasonic. Order Granting in Part Defendants’ Motion for Summary Judgment as to
 18 Costco’s Indirect Purchases at 7, Dkt. No. 7422 (Dec. 26, 2012) (“Viewing the evidence in the
 19 light most favorable to plaintiff, the Court concludes Costco has provided sufficient evidence of
 20 Panasonic’s ownership and control of alleged co-conspirators *to create a genuine issue of*
 21 *material fact.*”) (emphasis added).

22 The Court has also recognized that factual questions remain with respect to ownership and
 23 control between Chunghwa and Tatung. Plaintiffs collectively seek approximately \$2.6 million
 24 in damages based on purchases from Tatung. *See* Chung Decl. Exs. A & B. The Court has
 25 acknowledged that “[t]he factual record is disputed as to the relationship between TUS, CPT, and
 26 Tatung Taiwan, as well [as] whether TUS’s purchases of LCDs and finished products containing
 27 LCDs was truly arms-length or in furtherance of the alleged conspiracy.” Order Denying Tatung
 28 Company of America’s Motion to Dismiss DPPs’ First Amended Consolidated Complaint at 3,

Dkt. No. 873 (Mar. 3, 2009); *see also* Order Denying Tatung Company of America's Motions to Dismiss at 5, Dkt. No. 1885 (July 19, 2010) ("[T]he Court holds that, *at this stage of the litigation*, TUS has not shown that it is not a proper defendant under *Royal Printing*.") (emphasis added). These disputes, among others, have not been resolved.

B. Questions of Standing Are for the Court to Decide

In *ATM Fee*, the Ninth Circuit expressly reaffirmed that standing under the Clayton Act "is a question of law for the district court to decide." *In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 747 (9th Cir. 2012); *see also Delaware Valley Surgical Supply Inc. v. Johnson & Johnson*, 523 F.3d 1116, 1119 (9th Cir. 2008) ("Standing is a question of law . . ."). Any factual disputes with respect to Plaintiffs' standing must therefore be decided by the Court, and not the jury. *ATM Fee*, 686 F.3d at 747 ("Because the court (and not a jury) decides standing, the district court *must* decide issues of fact necessary to make the standing determination.") (emphasis added).

At trial, Plaintiffs must establish that they have standing under *ATM Fee* by a preponderance of the evidence. *See ATM Fee*, 686 F.3d at 747 ("[E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.") (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). The Court's prior orders in this MDL comport with the Ninth Circuit's observation that the Plaintiffs' burden varies according to the successive stages of the litigation. At the motion to dismiss stage, plaintiffs must allege non-conclusory facts to support their contention that they have standing under *Royal Printing* / *ATM Fee*. *See* Order Denying Toshiba's Motion to Dismiss Best Buy's First Amended Complaint at 6, Dkt. No. 7543 (Jan. 23, 2013) ("Best Buy's allegations — that it purchased LCD products from defendants, including TAIS, and TSB, the parent company of TAIS, owned or controlled panel manufacturer TMD . . . — are sufficient to state a claim under the exception *at this stage*.") (emphasis added). At the summary judgment stage, plaintiffs must show that there is a genuine issue of material fact for trial. *See* Order Granting in Part Defendants' Motion for Summary Judgment as to Costco's Indirect Purchases at 7, Dkt. No. 7422 (Dec. 26, 2012) (denying summary judgment where Costco "provided sufficient evidence of

1 Panasonic's ownership and control of alleged co-conspirators to create a genuine issue of material
 2 fact."). Having passed these threshold tests, Plaintiffs now bear the burden of demonstrating
 3 standing by a preponderance of the evidence at trial.

4 **C. The Court Should Determine Whether Plaintiffs Have Met Their Burden of**
 5 **Demonstrating Ownership and Control at Trial**

6 Courts have adopted a number of procedures for determining whether plaintiffs have met
 7 their burden of demonstrating standing. For instance, a district court may hold an evidentiary
 8 hearing, or decide the issue of standing at trial. *See Hohlbein v. Hospitality Ventures LLC*, 248
 9 Fed. Appx. 804, 806 (9th Cir. 2007) ("We note, however, that because the evidentiary burden to
 10 demonstrate standing remains on [Plaintiff], the district court may revisit the issue of standing in
 11 an evidentiary hearing or at trial, where the controverted facts 'must be supported adequately by
 12 the evidence adduced' there.") (quoting *Lujan*, 504 U.S. at 561). Issues concerning ownership
 13 and control were disputed in the trial between DPPs and Toshiba, but those issues were never
 14 resolved. *See* DPP Trial Transcript at 3566:15-20; 3576:10-11 (June 28, 2012) (denying
 15 Toshiba's request for a verdict form requiring factual findings of ownership or control). Since
 16 then, the Ninth Circuit has clarified that factual disputes related to standing are for a district court
 17 to decide. *ATM Fee*, 686 F.3d at 747. In light of this Court's determination that it will not hold a
 18 separate evidentiary hearing, Defendants suggest that the Court adopt a three-step procedure that
 19 will allow the Court to efficiently discharge its duty of deciding whether Plaintiffs have
 20 demonstrated standing, while simultaneously avoiding any risk of confusing the jury.

21 In the initial step, at the conclusion of Plaintiff's presentation of factual evidence in their
 22 case in chief, the Court should conduct an analysis of whether Plaintiffs have proven that their
 23 purchases fall within the ownership or control exception, the sole exception on which they rely.
 24 This analysis entails a two-part inquiry, and the Court may, of course, request that the parties
 25 submit trial briefs or proposed findings of fact and conclusions of law to assist the Court in
 26 deciding these issues. First, the Court must determine whether Plaintiffs have put forward
 27 sufficient evidence to demonstrate that, more likely than not, the entities from which Plaintiffs
 28 made LCD product purchases were owned or controlled by alleged conspirators. Second, the

1 Court must determine whether Plaintiffs have put forward sufficient evidence to demonstrate that,
2 more likely than not, the alleged conspirators in each Defendant or Co-conspirator group in fact
3 joined the conspiracy as alleged. *See ATM Fee*, 686 F.3d at 749 (“[I]ndirect purchasers may sue .
4 . . . when a *conspiring* seller owns or controls the direct purchaser.”) (emphasis added); Order
5 Denying Defendants’ Joint Motion and Toshiba’s Separate Motion for Partial Summary Judgment
6 for Lack of Standing at 5, Dkt. No. 7188 (Nov. 19, 2012) (“[*Royal Printing*] was concerned with
7 the relationship between the *conspirator* and the direct purchaser.”) (emphasis in original). To
8 avoid jury confusion, this determination should be made before Plaintiffs’ damages experts are
9 permitted to testify. To the extent that Plaintiffs fail to carry their burden, Plaintiffs’ experts
10 should be prohibited from testifying that Plaintiffs suffered damages based on the associated
11 purchases. For instance, if Plaintiffs fail to offer sufficient evidence of ownership or control with
12 respect to Panasonic, or if they fail to offer sufficient proof that Panasonic joined the alleged
13 conspiracy, the expert would be prohibited from testifying as to alleged Clayton Act damages
14 incurred as a result of purchases of finished products from Panasonic.

15 Second, the Court should repeat the two-part inquiry set out above at the close of
16 Defendants’ presentation of factual evidence in their case in chief, taking into account any newly
17 introduced evidence. This determination should be made prior to the testimony of Defendants’
18 damages experts, again to minimize the risk of jury confusion. If the Court finds a lack of
19 standing with respect to damages included in the testimony of Plaintiffs’ experts (who will by this
20 point have already testified), the Court should provide an instruction striking the expert testimony
21 to the extent it had incorrectly assumed standing.

22 Third, in the final instructions, the Court should instruct the jury that it cannot award
23 Clayton Act damages based on purchases from any Defendant or Co-conspirator group for which
24 the Court has determined that Plaintiffs have not demonstrated standing in the earlier phases of
25 the trial. In addition, the jury should be charged with determining, as to liability, whether
26 Plaintiffs have proven that the entities in each Defendant and Co-conspirator group participated in
27 the conspiracy. This will require a specific finding by the jury as to whether each alleged
28 conspirator was in fact a conspirator; such a finding is necessary regardless of whether the alleged

1 conspirator is, or ever was, a Defendant. If the jury determines that a particular group did not
 2 participate in the conspiracy, the issue of standing will become moot with respect to that group.
 3 For instance, if the jury finds that non-Defendants such as NEC, Mitsubishi or Panasonic were not
 4 “conspirators,” there would be no basis for awarding damages based on sales from those entities.
 5 *See, e.g.*, Order Granting in Part Defendants’ Joint Motion to Dismiss and NEC’s Motion to
 6 Dismiss (CompuCom) at 4 n.3, Dkt. No. 6506 (Aug. 21, 2012) (“While the Court agrees with
 7 NEC that much of the evidence upon which CompuCom relies is not particularly probative of
 8 NEC’s participation in the conspiracy, taken as a whole CompuCom’s allegations satisfy the
 9 minimum requirements of the federal rules.”). This procedure will ensure that Plaintiffs will not
 10 be awarded damages that they do not have standing to recover, *i.e.*, purchases from entities that
 11 were owned or controlled by *non*-conspirators. *See* Order Granting in Part Defendants’ Motion
 12 for Summary Judgment as to Costco’s Indirect Purchases at 5-8, Dkt. No. 7422 (Dec. 26, 2012)
 13 (dismissing damages claims based on purchases from entities that were not owned or controlled
 14 by a conspirator).

15 **III. CONCLUSION**

16 Defendants respectfully submit that the Court should adopt the procedure outlined above
 17 for determining the outstanding factual issues concerning Plaintiffs’ standing to recover damages
 18 under the Clayton Act for their LCD product purchases. To the extent that the Court chooses to
 19 adopt a different procedure, Defendants submit that any such procedure must consider whether
 20 Plaintiffs met their burden of demonstrating both (1) ownership or control and (2) participation in
 21 the conspiracy, by each Defendant or Co-conspirator group whose sales form the basis for
 22 Plaintiffs’ claims under the Clayton Act.

Respectfully submitted,

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DATED: May 8, 2013

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